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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BEATA BARTKOWSKA, TIMOTHY JOHN FOSTER,
SARAH JANE GRAY, SUDARSHI TANUJA REGISMOND
and JEFFREY UNDERDOWN

Appeal 2010-004924
Application 10/664,101
Technology Center 1700

Before TERRY J. OWENS, PETER F. KRATZ and JEFFREY T. SMITH, *Administrative Patent Judges.*

SMITH, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134 from the final rejection of claims 1 through 5, 20, 21, and 23. We have jurisdiction under 35 U.S.C. § 6.

Appellants' claimed invention relates to "a frozen aerated product such as ice cream, wherein the frozen aerated product is stabilised [sic] by

plant derived ingredients in their unrefined state and has no additional refined emulsifiers or stabilisers. [sic]" Spec. 1. Claim 1 is illustrative:

> 1. A frozen aerated product having an overrun of between about 10% and about 250% and a pH, when melted, in the range from about 3.5 to about 5.2, comprising:
>
> i) water;
>
> ii) 0 to about 20 w/w% fat
>
> iii) 0.25 to about 20 w/w% milk solids containing proteins and lactose but not fat;
>
> iv) 0.05 to about 1.5 w/w% soluble dietary fibre and 0.1 to about 5 w/w% insoluble dietary fibre;
>
> v) 0.1 to about 35 w/w% sweetener;
>
> wherein the composition contains no additional stabilizers and no additional emulsifiers;
>
> wherein the frozen aerated product shows a resistance to meltdown and to serum leakage for extended periods of time as determined by having a meltdown initiation time greater than about 120 minutes when measured at 20° C; and
>
> wherein the frozen aerated product is made by a process that includes either of the following steps:
>
> a) adjusting the pH of a fruit and/or vegetable puree to a value above an isoelectric point of any protein to be incorporated into the frozen aerated product followed by; producing a premix comprising fat, milk solids not fat, sweetener and about 5 to about 80 w/w% of said pH adjusted fruit and/or vegetable puree followed by; homogenizing and pasteurizing said premix; or

> b) homogenizing and pasteurizing a premix comprising water, fat, milk solids not fat and sweetener, cooling the pasteurized premix and adding to said premix a fruit and/or vegetable puree containing sufficient soluble and insoluble fibre to provide the necessary soluble and insoluble fibre in the frozen aerated product.

The Examiner relied on the following references in rejecting the appealed subject matter:

Jonas	US 4,971,824	Nov. 20, 1990
Brake	US 6,432,466 B2	Aug. 13, 2002
Koss	WO 02/094035 A1	Nov. 28, 2002

Arbuckle, W.S., *Ice Cream*, Second Edition, The AVI Publishing Group, page 96 (1973).

Appellants request review of the following rejections (App. Br. 6) from the Examiner's final office action:

1. Claims 1-5, 21, and 23 stand rejected under 35 U.S.C. 102(a) as being anticipated by Koss.

2. Claim 20 stands rejected under 35 U.S.C. 103(a) as Koss in view of Brake.

3. Claims 1-5, 20, 21, and 23 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Brake in view of Jonas and Arbuckle.

OPINION[1]

[1] We will limit our discussion to independent claim 1.

Rejections under 35 U.S.C. 102(a)/ 35 U.S.C. 103(a) based on Koss

The dispositive issue for these rejections is: Did the Examiner err in determining that Koss describes a frozen aerated product having 0.05 to about 1.5 w/w% soluble dietary fiber and 0.1 to about 5 w/w% insoluble dietary fiber as required by the subject matter of independent claims 1 and 23?

We answer this question in the affirmative.

We REVERSE.

With respect to the anticipation rejection over Koss, the Examiner bears the initial burden of establishing a prima facie case of anticipation. *In re King*, 801 F.2d 1324, 1326-27 (Fed. Cir. 1986). Anticipation under 35 U.S.C. § 102 requires that "each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999).

The Examiner found that Koss discloses a frozen aerated product with an overrun of 30% and a pH of about 4.5. Ans. 4. Citing to various examples and passages of Koss, the Examiner additionally found that Koss' frozen aerated product that can include water, 1.1-1.8% nonfat dry milk which is skim milk powder, about 0.02-22% sweetener, and about 0.5-20% flavoring. *Id.* The Examiner asserts that Koss meets the soluble and insoluble dietary fiber limitations because "Koss teaches that the composition contains 0.5-20% fruit puree, including raspberry, cherry, and strawberry, one of ordinary skill in the art at the time the invention was made would expect that the composition as taught by Koss, which includes 0.5-20% fruit puree, inherently encompass the instantly claimed amount of

fiber, wherein the fiber is derived from fruit puree absent any clear and convincing arguments and/or evidence to the contrary." Ans. 5.

Appellants argue that "no examples [in Koss] contain fruit/and or vegetable purees, let alone purees in the absence of stabilizer that specifically provide the levels of soluble and insoluble fibers recited in appellants' claims." App. Br. 13.

The Examiner responds that "preferred embodiments and examples disclosed by a reference show the uses of a reference and do not limit the teachings of the reference itself." Ans. 13. Additionally, the Examiner repeats the earlier assertion that "the final product of Koss would contain substantially the same amount of fibers as the instantly claimed product absent any clear and convincing arguments and/or evidence to the contrary" since Koss discloses the addition of fruit purees. *Id.*

The Examiner has not adequately address Appellants' argument above. The Examiner cites to Koss' six examples, which are directed to different types of frozen aerated products, to selectively meet a number of claimed limitations. Ans. 4. Yet, the Examiner fails to point to any specific embodiment in Koss that establishes that a person of ordinary skill in the art was in possession of the claimed invention. We note that the Examiner particularly cites to Koss' Example 3 to meet the pH limitation (Ans. 4), which relates to a "Lemon-Lime Frozen Dessert" that does not include any milk products as required by Appellants' independent claim 1. The Examiner also cites to Koss' Examples 1 and 5, that contain milk products, however , these examples have pH levels greater than Appellants' claimed pH range of 3.5 to about 5.2. Koss, pp. 27, 31-32. The Examiner does not point to specific embodiment in Koss that evidences that a person of

ordinary skill in the art was in possession of a milk based frozen aerated product with a pH range of 3.5 to about 5.2. Koss' Example 3 and disclosure also fail to provide any indication of the soluble and insoluble fiber content in the disclosed frozen aerated product. The Examiner again has not adequately explained why the fruit puree of Koss necessarily results in Appellants' claimed soluble and insoluble dietary fiber content. Thus, we agree with Appellants "that Koss does not teach substantially the same composition as recited in claim 1." App. Br. 12.

The Examiner's rejection appears to be based on the premise that a person of ordinary skill in the art could have selected the proper combination of additives from the disclosure of Koss. This is not the proper standard for an anticipation rejection. A claim is not anticipated by a reference when such independent picking and choosing is required to arrive at the claimed invention. *See In re Arkley*, 455 F.2d 586, 587 (CCPA 1972).

Under these circumstances, we cannot conclude that the Examiner has met the minimum threshold of establishing anticipation under 35 U.S.C. § 102(a).

We also cannot sustain the Examiner's rejection of claim 20 under 35 U.S.C. § 103(a) over Koss and Brake. We note that the Examiner cited Brake only to teach "that milk solids non fat [(skim milk)] were included in frozen confections with fruit purees from 0-10% in order to provide textural properties." Ans. 7. Appellants argue, and we agree, that "Brake does not remedy the shortcomings of Koss" (App. Br. 16), as discussed above.

Therefore, the rejection of claims 1-5, 21, and 23 under 35 U.S.C. § 102(a) over Koss and the rejection of claim 20 under 35 U.S.C. § 103(a) over Koss and Brake are reversed.

Rejections under 35 U.S.C. 103(a) based on Brake

The dispositive issue for this rejection is: Did the Examiner err in determining that the combination of Brake and Jonas would have led one skilled in the art to adjust the pH of Brake's milk based product based on the teachings of Jonas' non-milk based product as required by the subject matter of claims 1 and 23?[2]

We answer this question in the affirmative and REVERSE.

The Examiner found that "Brake teaches of a frozen product comprising about 11-69% sweetener (high fructose corn syrup, corn syrup, maltodextrin, sucrose, and FRUITRIM- Column 3 lines 26-36), about 0.2-1.5% stabilizer, about 0-0.12% emulsifier, 0-10% non-fat milk solids, 0-5% milk fat, water, and 20-90% by volume fruit puree including raspberry and strawberry." Ans. 8. The Examiner also found that Brake did not teach the overrun percent, product pH, and the amount of soluble and non-soluble dietary fiber in the product as recited in independent claim 1. *Id.* Independent claim 1 requires 0.25 to about 20 w/w % milk solids, the Examiner is relying on Brake to meet this limitation. *Id.* The Examiner relies on Jonas to teach a frozen aerated product containing fruit puree with a pH of less than about 4.5 and an overrun of 18-100%. Ans. 8-9.

The Examiner concludes, based on the teachings of Jonas, that "it would have been obvious to one of ordinary skill in the art at the time the invention was made to aerate the frozen product as taught by Brake to a

[2] A discussion of the Arbuckle reference will be unnecessary for disposition of the present appeal. The Examiner relied upon this reference for describing features not related to the dispositive issue.

specific amount from 18-100% depending on the final form and hardness of the final product" and "to adjust the pH of the frozen fruit confection of Brake to about 4.5 in order to form a final frozen fruit confection which did not remain liquid or separate after processing." Ans. 9.

Appellants argue that "Jonas does not disclose compositions containing milk solids in combination with fruit purees or other sources of dietary fiber." App. Br. 19. Appellants argue that Jonas dissuades the use of milk solids because it seeks to avoid "'the disadvantageous ingredients of a milk product based food. For example, the dessert of the instant invention is very low fat, has no milk, milk solids, lactose, cholesterol, added sugars, or artificial flavors'" (emphasis added). *Id.*, Jonas, col. 3, ll. 33-41.

The Examiner responds that Brake and Jonas "teach of frozen confectionaries and the knowledge of the prior art, i.e. Jonas, supports modifying the reference of Brake. Specifically, Jonas teaches that in a frozen confectionary product containing fruit puree, a pH of about 4.5 forms a final product which does not remain liquid or separate after processing." Ans. 21. The Examiner concludes that "one would have been motivated to adjust the pH of the frozen fruit puree composition of Brake to about 4.5 in order to form a final product which did not remain liquid or separate after processing as taught Jones." *Id.*

The Examiner's response does not adequately address Appellants' argument and is insufficient to support the prima facie case of obviousness. The Examiner does not explain how the pH teaching for Jonas' non-milk based frozen aerated products is relevant to the milk based frozen aerated products of Brake. The Examiner has not adequately explained that a person of ordinary skill in the art would have reasonably expected that utilizing the

techniques for adjusting the pH described in Jonas would not have adversely affected the milk-based product of Brake.

"[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 418 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)).

Therefore, the rejection of claims 1-5, 20, 21, and 23 under 35 U.S.C. § 103(a) over Brake, Jonas and Arbuckle is reversed.

ORDER

The rejection of claims 1-5, 21, and 23 under 35 U.S.C. 102(a) as anticipated by Koss is reversed.

The rejection of claim 20 under 35 U.S.C. 103(a) as unpatentable over Koss and Brake is reversed.

The rejection of claim 1-5, 20, 21, and 23 under 35 U.S.C. 103(a) as unpatentable over Brake, Jonas and Arbuckle is reversed.

REVERSED

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